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Department of Veterans Affairs
Office of Employment Discrimination
Complaint Adjudication

Summaries of Selected Decisions Issued by the Office of Employment Discrimination Complaint Adjudication

FROM THE DIRECTOR

The Office of Employment Discrimination Complaint Adjudication is an independent, adjudication unit created by statute. Located in the Office of the Secretary, OEDCA's function is to issue the Department's final decision or order on complaints of employment discrimination filed against the Department. The Director, whose decisions are not subject to appeal by the Department, reports directly to the Secretary of Veterans Affairs.

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include sexual harassment, reprisal, documenting performance problems, and continuing violations.

Also included in this issue are two articles: one dealing with the importance of saving documents related to promotion/selection actions, and the other dealing with the importance of seeking professional advice from the Human Resources staff before taking disciplinary action.

The *OEDCA Digest* is available on the World Wide Web at: http://www.va.gov/orm/oedca.htm.

Charles R. Delobe

I

THE IMPORTANCE OF DOCUMENTING POOR PERFORMANCE

One of the articles in this quarter's edition of the Digest addresses the importance of saving promotion documents in the event a complaint is filed challenging a selection action. This case illustrates why it is also important for supervisors to document performance related problems.

The employee in this case [hereinafter the "complainant"] received a permanent appointment, subject to completion of a one-year probationary period. The first six months of his appointment were uneventful, and he experienced no problems on the job.

During the seventh month, his son died suddenly and under tragic circumstances, necessitating his absence from work for a period of time to deal with the funeral and related matters. Shortly thereafter, his wife instituted divorce proceedings, leaving him with no place to live. In addition, his mother experienced serious medical issues requiring him to take additional time off from work.

One of the complainant's coworkers, a female not of the same race as complainant, offered to help by renting him a room in her home. Soon thereafter, they became romantically involved. They were often seen together, and their relationship became common knowledge in the workplace, including the fact that they were living together.

A few months later, the complainant was terminated from his position for poor performance and attendance problems. The complainant claimed that it was due to his race; more specifically, the fact that he was romantically involved with a female of a different race.

After conducting a hearing and reviewing the evidence, an EEOC judge concluded that management's reasons for the termination lacked credibility, and that race was more likely than not the motivation for the termination. The evidence showed that his supervisors never documented any performance-related problems. The six-month performance review he received a few months before becoming romantically involved with his coworker was satisfactory, with no deficiencies noted. The supervisor tried to explain this away by claiming that she "had no option" but to rate him successful, even though she considered him to be a poor performer. Unfortunately, she was unable to produce any documents to support this contention, such as counseling memos, warning letters, examples of poor work, *etc*.

The supervisor also cited the complainant's "abuse of leave" as a reason for the termination. At the hearing, however, she conceded that the leave used in connection with his son's death was approved and "understandable," and that his other leave requests were also ap-

proved. At no time did she counsel him, verbally or in writing, about abusing leave; document any concerns about his use of leave; or provide convincing examples of leave abuse.

Finally, the judge noted credible testimony at the hearing that the complainant's second level supervisor had expressed disgust regarding the complaint's relationship with the coworker, although it was unclear from the testimony whether the disgust stemmed from the interracial relationship, their frequent public displays of affection in the workplace, or both.

In reaching his finding of discrimination, the EEOC judge relied heavily on the lack of credibility on the part of the supervisors, particularly regarding their failure to point to documentation that might support their claims of poor performance and leave abuse. Unfortunately, the facts in this case are not unusual, at least with respect to the failure by supervisors to document problems with employees. Many findings of discrimination result solely or primarily from such failures, even though, in some of these findings, the supervisors may very well have testified truthfully about the employee.

The lesson here for supervisors is obvious. It is not always enough to be right. If you are having problems with an employee regarding performance or conduct, be sure to document it and be prepared to offer something more than just your testimony to justify your actions.

II

FLIRTATIOUS CONDUCT RESULTS IN TERMINATION

An employee recently learned the hard way that inappropriate discussions in the workplace can get you fired. The male employee in this case, who was still in his probationary period, had shaved his head. A female coworker told him that she would dye her hair to its natural red color if he would allow his hair to grow back. He agreed and allowed it to grow back, at which point he approached her and asked if she was ready to dye her hair. He then told her that he would need to see her pubic hairline in order to match the correct color of her hair. She declined. He assured her that he was not interested in sex and only wanted to ensure a correct color match. She again declined. They continued to talk for another 15 minutes on unrelated matters. Following the conversation, she initiated an EEO complaint, alleging sexual harassment.

Management officials reacted immediately to her allegations. The male employee was placed in a non-duty status and later notified that he would be terminated for his unwelcome sexual comments in violation of the facility's policy memo entitled "Prevention of Sexual Harassment."

The male employee then filed an EEO complaint claiming that his removal was due to his race. As evidence of discrimination, he pointed to two other

employees not of his race who were not terminated after violating the same policy. Moreover, he noted that he and the female coworker were simply engaging in mutual flirtation and that his conduct was not unwelcome. Essentially, he was arguing that his conduct did not constitute sexual harassment, as defined by law; hence, his removal for violating the facility's sexual harassment policy was unjustified.

An EEOC judge and OEDCA disagreed. The judge conceded that the complainant's claim of mutual flirtation was not entirely unreasonable, given the facts of the case. Nevertheless, the issue was not whether his conduct amounted to sexual harassment in the legal sense, but rather, whether management's actions were based on his race. The judge concluded that they were not.

The judge noted that sexual harassment policies, such as the one in this case, prohibit certain types of behavior, and that employees who engage in the prohibited behavior can be punished, regardless of whether the behavior constitutes "sexual harassment" in the legal sense. As for the other two employees who were not punished for violating the policy, the judge noted that they were not in their probationary period. Hence, they were not similarly situated for comparison purposes.

The lesson in this case is that employees who use inappropriate language in the workplace do so at their peril. Managers and supervisors have a legal obligation to correct inappropriate behavior before it rises to the level of sexual harassment. Indeed, those who fail to act promptly, appropriately, and effectively run the risk of having their employer incur liability for the harassment, thus placing their own jobs or careers in jeopardy.

Given the serious legal consequences for managers and supervisors who do not react promptly and effectively, it is inevitable that they may occasionally overreact. Complaints of discrimination based on such overreaction will be especially difficult to prove, absent convincing evidence of a discriminatory motive on the part of the responsible management official.

III

COERCED SEX IS A "TANGIBLE EMPLOYMENT ACTION"

In 1998, the U.S. Supreme Court held in two separate cases that employers are subject to strict liability (*i.e.,* they will be automatically liable) for unlawful harassment by a supervisor that results in a "tangible employment action." Employers in such cases will not be able to avail themselves of the affirmative defense available in hostile environment cases where there is no tangible employment action. In other words, when a supervisor takes a tangible employment action, the employer will not be able to avoid liability by showing that (1) it exercised reasonable care to

prevent and correct promptly the harassing behavior, and (2) the complainant unreasonably failed to take advantage of any corrective or preventive opportunities provided by management, or to avoid harm otherwise.

An important question, obviously, is what constitutes a "tangible employment action." Although the Supreme Court identified several common employment actions that it deemed "tangible", such as hiring, firing, and failing to promote an employee, it did not resolve the question of whether a subordinate's submission to a supervisor's *quid pro quo* demand for sexual favors amounts to a tangible employment action. Two recent U.S. Courts of Appeals decisions from the Second and Ninth Circuits have held that it does.

In both cases, the courts held that sexual extortion constitutes a "tangible employment action", and that it matters not whether the supervisor succeeds in coercing sex, or fails in the attempt and takes adverse action against the employee. In either case, the "tangible employment action" is the abuse of supervisory authority. Moreover, according to the EEOC's guidance in this area[1], the same result obtains even if the employee submits to the coercion and receives a tangible job benefit!

IV

[1] EEOC Enforcement Guidance: *Vicarious Employer Liability for Unlawful Harassment by Supervisors*, dated June 18, 1999 (http://www.eeoc.gov/docs/harassment.html)

POOR-PERFORMING EMPLOYEE PREVAILS IN HER REPRISAL CLAIM

Though it may seem an unjust result, employees with performance or conduct problems sometimes win their EEO cases. Consider the following case in point.

The complainant, a psychiatrist, engaged in EEO activity by contacting an EEO counselor to complain about a threatened termination that she alleged was due to her gender and disability. A few weeks after meeting with the EEO counselor, her supervisor met with her to discuss her performance deficiencies. He brought a letter of counseling to the meeting, which he had drafted only a few days after the complainant's contact with the EEO counselor, and which he destroyed at the end of the meeting after the two had reached an agreement whereby the supervisor would put off issuing the letter, as worded, in return for improved performance by the complainant. It appears from the evidence that a promise by the complainant to withdraw her informal EEO complaint prompted the supervisor's decision to tear up the letter of counseling.

Six days later, however, the two met again. During this second meeting, the supervisor asked the complainant if she had filed a formal complaint because, to his knowledge, she had not yet withdrawn her informal complaint. She replied that she had not yet had an opportunity to withdraw the informal com-

plaint because she had trouble contacting the counselor. At that point, the supervisor handed her a letter of counseling regarding her performance deficiencies.

The supervisor admits asking her about her EEO complaint at this second meeting just before handing her the counseling letter. He claims, however, that the complainant's poor performance motivated his decision to issue the letter, not her EEO complaint. OEDCA disagreed, finding that the preponderance of the evidence pointed to a retaliatory motivation.

The record did show that the supervisor was frustrated with and had legitimate concerns about the complainant's job performance and her interactions with staff, and that those concerns would have warranted a counseling letter. However, those problems and concerns had been on-going for at least six to nine months, during which time the supervisor frequently counseled her, but only verbally. Only after the complainant initiated the EEO complaint process did he decide to address the problem in writing. Moreover, there was nothing about the complainant's performance during the month prior to the issuance of the counseling letter that would explain or justify the supervisor's decision to suddenly issue the letter at that point. It was, therefore, clear from the record that the supervisor was willing to tolerate the complainant's performance deficiencies until she initiated an EEO complaint against him, and that it was the complaint that prompted him to address the matter in writing.

Cases like this are not unusual. Findings of reprisal often result in cases where the complainant is either a poor performer or a disciplinary problem, or both. Typically, management ignores the problem, or does little about it, until the complainant engages in EEO activity. At that point, management determines that "enough is enough" and that some action needs to be taken to address the problem. Unfortunately, the motive for acting at this late stage is retaliation – *i.e.*, but for the complainant's EEO activity, management would have continued to tolerate the problem.

From the standpoint of management this may seem an unfair result, but it is a legally correct one, and one that can be avoided by taking prompt and appropriate action to deal with performance or conduct issues as soon as they arise.

V

TOUCHING OF AN EMPLOYEE'S SHOULDER BY A SUPERVISOR NOT SUFFICIENT TO ESTABLISH EITHER A CONTINUING VIOLATION OR SEXUAL HARASSMENT

A female employee claimed she was the victim of sexual harassment. A male coworker regularly asked her inappropriate questions, such as whether she would like to be involved in a "threesome", whether she cheated on her hus-

band, and other objectionable inquiries. In addition, he regularly grabbed her breasts and crotch area and tried to kiss her. One day the coworker pushed her down on the floor in the radiology dark room, got on top of her, and fondled her until he suddenly stopped and stood up, whereupon she immediately left the room. The complainant always responded by telling him "to knock it off and get out." She did not, however, report his conduct to anyone in management, despite advice from two coworkers to do so.

Eventually, a female employee who worked with the complainant approached the Chief of Radiology, after the complainant told her that the harasser was "grabbing her ass," and advised him that there was a serious sexual harassment problem in his section. She did not, however, identify the harasser or the victim; nor did she provide him with any specific details concerning the harassment.

Upon hearing of the problem, the Chief took immediate action to address it. He ordered sexual harassment training for all employees, met with the Department's legal counsel, and provided written notification to all employees in his section that sexual harassment would not be tolerated.

After attending the sexual harassment training, the complainant notified the Chief of the identity of the harasser and provided a list of all of the prior incidents of harassment. The Chief immediately notified Human Resources and the VA Police, who in turn notified the FBI and the U.S. Attorney's Office.

The harasser, who had been out on leave for several days, "resigned" without returning to work. Shortly thereafter, he was arrested, charged, and eventually pled guilty to aggravated sexual assault.

Approximately six months after reporting the harassment to management, the complainant contacted an EEO Counselor to complain of sexual harassment after her immediate supervisor had touched her on the shoulder to get her attention so he could tell her something. The complainant alleged that this incident involving her supervisor was a continuation of the sexual harassment she had previously experienced (*i.e.*, a "continuing violation"), and that she should therefore be allowed to include those prior incidents of harassment even though she did not bring any of those incidents to the attention of an EEO Counselor within 45 days of their occurrence, as required by EEOC's complaint processing regulations. An EEOC judge and OEDCA disagreed.

The judge noted the six month span between the prior incidents and the one involving her immediate supervisor. In addition, he noted that the types of incidents were different, as were the people involved. The prior incidents were clearly sexual in nature involving a coworker, while the shoulder-touching incident was not sexual in nature and

involved a supervisor trying to get her attention. Moreover, the complainant did not even claim that the touching was sexual in nature, but rather that the supervisor should have realized that touching her shoulder was not a good idea, given all that had transpired previously.

The judge concluded, that the "continuing violation" theory did not apply in this case because the complainant was essentially raising two separate, distinct, and unrelated harassment claims: one involving the coworker, which was not timely raised with an EEO Counselor and should therefore be dismissed procedurally; and an entirely distinct one involving the supervisor, which was timely raised with a Counselor, but did not involve sexual harassment. On the latter claim, the judge ruled that the touch was not sexual in nature, involved only one isolated incident that was not severe or egregious, and was not unwelcome, as the complainant did not object, either expressly or by her actions, when the supervisor tapped her on the shoulder. Thus, she failed to demonstrate that this one incident involving the supervisor amounted to sexual harassment.

Even if the complainant were permitted to include the untimely incidents involving the co-worker in her harassment claim involving the supervisor, the claim would still fail. As noted previously, management acted immediately and appropriately as soon as it learned of the harassment by the coworker. Their actions resulted in the complainant's resignation and subsequent federal conviction. Employers may avoid liability for co-worker harassment if they can show that they took prompt, appropriate, and effective action. Management took such action in this case and was therefore not liable.

VI

THE IMPORTANCE OF SAVING SELECTION DOCUMENTS

The following article is reproduced with permission of "FEDmanager", a weekly e-mail newsletter for Federal executives, managers, and supervisors published by the Washington D.C. law firm of Shaw, Bransford, Veilleux, and Roth, P.C. Although previous editions of the OEDCA Digest have addrressed this same topic, the message bears repeating. Failure to heed the advice has resulted in findings of discrimination.

If you are involved in selecting someone to fill a job vacancy, keep your selection records. That includes rating and ranking sheets, interview notes, and any other materials you generate or rely upon during the selection process. The reason is that your agency will need to produce these records if any of the applicants files an EEO complaint.

More and more, the EEOC is awarding sanctions against agencies because the agencies cannot produce vital records regarding selections. The sanctions may come in the form of an "adverse infer-

ence" against the agency, attorneys fees awarded to a complainant, or even a default judgment against the agency.

In a recent EEOC case, an agency did not keep the applications or the interview notes from the first of two different selection processes to fill a management position. Even though no candidate was actually hired from the first announcement, two candidates received offers, and their applications and interview notes were relevant evidence. The EEOC sanctioned the agency with the adverse inference that those missing applications and notes would have shown that the complainant was the most qualified applicant. Based in part on that inference, the EEOC Judge ruled for the complainant.

Read your agency's document retention policy, as well as 29 C.F.R. §1602.14. Even if your human resources or administrative officer collects your paperwork after the selection, you may want to retain a copy for yourself and be a hero when someone from General Counsel's office comes looking for it.

VII

THE IMPORTANCE OF SEEKING PROFESSIONAL ADVICE FROM THE HUMAN RESOURCES STAFF

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Use the agency resources that are at your disposal! They can be invaluable and can save you from future aggravation if an EEO complaint comes around the corner. One of the most important resources is the employee relations office. If that office is ignored, a manager may make an error that could have been easily avoided, and that error could lead to an EEO complaint against the manager. I recently heard about a manager who issued a proposed 5-day suspension to an employee for engaging in unprofessional conduct for arguing with a coworker. It was later discovered during the reply process that the agency's table of penalties provided that the employee should be disciplined for such a charge only after being counseled for prior incidents of similar misconduct. The employee had no prior incidents and no prior counseling sessions on her record. The manager had not consulted with the employee relations office, which would have undoubtedly told the manager about the table of penalties. The manager could then have: 1) conducted the recommended counseling; or 2) developed a rationale for why the table of penalties should be ignored in this case.

Instead, after the proposed discipline was issued, the manager felt forced to rescind the proposed disciplinary action and conduct formal counseling. This caused embarrassment to the manager, and exacerbated what was already a

poor relationship between the manager and subordinate employee. It also resulted in a waste of time and resources when the employee then filed an EEO complaint alleging harassment because of the proposed 5-day suspension, which was reduced to a counseling session. Since the manager was unaware of the original table of penalties provision when the discipline was first proposed, the manager had a more difficult time overcoming the employee's EEO claim, and appeared uninformed and over-reactive to higher-level management. A simple, early check with a specialist in human resources would have armed the manager with sufficient information to avoid the mishap altogether.